



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 3, 2005

Ms. Ellen B. Huchital
McGinnis, Lochridge & Kilgore, L.L.P.
1221 McKinney Street, Suite 3200
Houston, Texas 77010

OR2005-04871

Dear Ms. Huchital:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 225430.

The Eanes Independent School District (the "school district"), which you represent, received a request for: 1) "any and all documents that show or reflect settlement offers, settlement agreements, lawsuits, mediations, GF and FNG complaints, and requests or grievance hearings to the EISD Board of Trustees for the past five school years, including complaints of any nature and the resolution thereof"; 2) "any and all documents that show or reflect accessibility of the Westlake High School football stadium, including but not limited to access by wheelchair to the press box of that stadium"; and 3) "any and all information about [a named individual], past teacher at Bridge Point Elementary." You state that the school district will release information responsive to the second portion of the request to the extent it existed at the time of the request, but claim that the information responsive to the first and third portions of the request is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.114, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.

We first note that portions of the submitted information are subject to section 552.022 of the Government Code. This section provides in part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(17) information that is also contained in a public court record; and

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(3), (17), (18). The documents you have submitted as Exhibit E include executed contracts related to the expenditure of funds by the city, which are subject to section 552.022(a)(3) of the Government Code. The documents that the school district has submitted as Exhibit F include information that also is contained in a public court record. This information must be released under section 552.022(a)(17) unless any of the information is expressly confidential under other law. Exhibit F also contains executed settlement agreements. Section 552.022(a)(18) makes public a settlement agreement to which a governmental body is a party, unless the agreement contains information that is expressly confidential under other law. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (government body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103); 522 at 4 (1989) (discretionary exceptions in general). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Thus, the school district may not withhold any of the information that is subject to section 552.022 under section 552.103. However, we will consider whether your remaining exceptions apply to this information.

Next, we address the information in Exhibits E and F that is not subject to section 552.022. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The school district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The school district must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that, if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

In this instance, although you concede that no lawsuit had been filed at the time the district received the request for information, you state that the requestor has filed complaints against the district with: the United States Department of Education Office for Civil Rights, the Texas Education Agency, and the Attorney General of Texas. Furthermore, you provide a copy of correspondence from the requestor in which she states that she has also filed complaints with the State Board of Educator Certification and the Travis County District Attorney's Office. In the case of the remaining information in Exhibit E, you state that the requestor has "filed for a due process hearing related to her son's education placement" in which "a hearing examiner has been appointed, written discovery has occurred, and pre-hearing conferences have taken place." You have submitted copies of these complaints and grievances, which were filed prior to the date that the school district received this request

for information. Based upon your representations and the totality of the circumstances, we conclude that the school district reasonably anticipated litigation on the date that it received this request for information. We also find that Exhibit E relates to the anticipated litigation. Accordingly, we conclude that section 552.103 is applicable, and the remaining information in Exhibit E may be withheld on that basis.¹ However, we conclude that you have not demonstrated that the information in Exhibit F is related to pending or reasonably anticipated litigation. We therefore conclude that the information in Exhibit F may not be withheld under section 552.103.

Further, with respect to the remaining information in Exhibit E, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also contend that some information in Exhibit F is confidential under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into the Act. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Information must be withheld under FERPA only to the extent reasonable and necessary to avoid personally identifying a particular student. *See* Open Records Decision Nos. 332 (1982), 206 (1978).

¹As our ruling on this issue is dispositive of the information in Exhibit E, we do not reach your remaining arguments.

Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

Moreover, in Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold information that is protected by FERPA without the necessity of requesting an attorney general decision. *See* Open Records Decision No. 634 at 6-8 (1995). However, as you seek to withhold the submitted documents in their entirety under FERPA, we will address your claim that the entire documents are confidential.

Under FERPA, a student's parents have an affirmative right of access to their child's education records, although this right does not extend to information in the student's records that identifies other students. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *see also* 34 C.F.R. § 99.12(a) ("If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student."). Thus, the requestor in this case has the right under FERPA to inspect and review or be informed of information pertaining to her child in the submitted education records. However, the requestor does not have a right of access to information in the records that pertains to other students.

Under FERPA, an educational agency must withhold information identifying a particular student or information that if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related). You have not provided any information indicating that release of the remaining information would allow identities of students other than the requestor's child to be easily traced. We therefore determine that the remaining information is not confidential under FERPA and may not be withheld under section 552.101 on that basis. Accordingly, we find that the school district must allow the requestor to inspect and review or be informed of information pertaining to her child in the submitted education records, but that the names of students other than the requestor's child appearing in the submitted records must be withheld pursuant to section 552.101 of the Government Code in conjunction with FERPA.

Finally, we note that the remaining submitted documents also contain an e-mail address that is excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue is not one of the types specifically excluded by section 552.137(c).

Therefore, unless the individual at issue consented to the release of his e-mail address, the city must withhold the e-mail address in accordance with section 552.137 of the Government Code. We have marked the e-mail address accordingly.

In summary, the school district may withhold Exhibit E under section 552.103 of the Government Code. The school district must withhold the information in Exhibit F that we have marked under FERPA. The e-mail address that we have marked must be withheld under section 552.137 of the Government Code. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "L. Joseph James".

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 225430

Enc. Submitted documents

c: Ms. Dianna Pharr
2204 Westlake Drive
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(w/o enclosures)